

**Statement of Jerald N. Fritz
Allbritton Communications Company
On Behalf of the National Association of Broadcasters**

Hearing before the House Subcommittee on Telecommunications and the Internet

March 30, 2006

Good morning Chairman Upton, Ranking Member Markey, and Members of the Subcommittee, my name is Jerry Fritz. I am the Senior Vice President for Legal and Strategic Affairs for Allbritton Communications Company, the parent company of eight broadcast television stations including WJLA, Channel 7 here in Washington, DC, along with NewsChannel 8, the 24-hour cable news channel in Washington, Maryland and Virginia. Today I am testifying on behalf of the National Association of Broadcasters (NAB), a trade association that advocates on behalf of more than 8,300 free, local radio and television stations and also broadcast networks before Congress, the Federal Communications Commission and the Courts.

The television industry is pleased to be testifying about the proposed legislation, which is intended to promote competition in the multichannel video programming distribution (MVPD) market by encouraging new entrants. Greater competition in local video programming markets across the country would benefit consumers and broadcasters by providing new delivery platforms and more choices. Broadcasters generally support streamlining the franchising process as a way to promote entry by new competitors, such as telephone companies, into the consolidated MVPD marketplace. We support the proposed legislation on this basis, and on our understanding that it extends long-standing policies designed to promote localism, competition and diversity – including carriage and retransmission consent for local broadcast signals and local program exclusivity – equally to cable operators obtaining the new national franchise.

Broadcasters understand that Congress' basic public policy goal in proposing this legislation is to permit a competitive video marketplace to function. That same public policy goal was the basis for Congress' 1992 action creating a marketplace in which broadcasters have the opportunity to negotiate for compensation for MVPDs' use of their signals to attract paying subscribers. As the Federal Communications Commission (FCC) recently found, this retransmission consent marketplace functions as Congress intended and benefits broadcasters, MVPDs and, most importantly, consumers. Certain cable and satellite companies have recently asked Congress to interfere with these market-based negotiations for retransmission consent. These demands for a federal mandate purely to benefit MVPD self-interests while usurping the free functioning of the market are fundamentally unfair, and pose a very real threat to the ability of broadcasters to provide locally oriented programming to communities throughout the country.

The Deployment of Competitive MVPD Services Will Benefit Consumers and Programming Providers, Including Broadcasters

Television broadcasters support efforts to speed the deployment of new and innovative MVPD services. Particularly in light of massive consolidation in the cable industry, a new video distribution platform offers great promise. According to the FCC, the four largest MVPDs served 63 percent of all MVPD subscribers in 2005, up from 58 percent in 2004. FCC, *Twelfth Annual Report* in MB Docket No. 05-255, FCC 06-11 at ¶ 9 (rel. March 3, 2006). MVPD services offered over the platforms of new competitors have the clear potential to introduce much needed competition into this regionally and nationally consolidated marketplace. NAB sees this as a positive development for cable programming providers unaffiliated with cable operators, broadcasters and, most importantly, consumers.

Simply put, competition leads to better service at lower prices. For example, the Government Accountability Office (GAO) has found that competition to an incumbent cable

operator from a wireline provider resulted in cable rates that were 15 percent lower than in markets without this competition. GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 9-11 (Oct. 2003). In another study comparing markets with competition from an overbuilder with those lacking such competition, GAO found that communities with overbuild competition experienced an average of 23 percent lower rates for basic cable and higher quality service. GAO, *Telecommunications: Wire-Based Competition Benefited Consumers in Selected Markets*, GAO-04-241 (Feb. 2004). Without question, consumers will benefit from the lower prices, improved quality of service, and increased choices that competition should bring.

Video programming providers will also benefit from the timely deployment of a new video distribution platform. The emergence of another platform for the distribution of video programming will provide programmers unaffiliated with cable operators with potential new outlets for reaching viewers and therefore with greater opportunities for success in the marketplace. A number of cable programming networks and regional sports networks have previously expressed concern that large, consolidated cable operators are increasingly able to exclude independent programming networks from their systems and, thus, from the marketplace. *See, e.g., Twelfth Annual Report* at ¶¶ 173, 184. The rapid deployment of a competitive video distribution platform will ameliorate such problems, thereby also benefiting consumers through additional, diverse programming options.

Local television broadcasters will similarly benefit from the emergence of another competitive MVPD service. A new video distribution platform will represent another outlet for broadcast programming, including local news and information. Given broadcasters' dependence on advertising revenue (and thus on reaching as many viewers as possible), the expansion of our

opportunities for reaching consumers must be regarded as positive. The development of another video distribution platform for carrying broadcast programming may also encourage the development of innovative digital television programming, including multicast and high definition (HD) programming. If new MVPDs emerge as viable platforms for carrying local stations' HD and multicast programs, broadcasters will be encouraged to make the substantial investments needed to bring their multicast service plans to fruition. In the end, it is consumers that will benefit by receiving a greater diversity of programming, including local programming, from multicasting broadcast stations and unaffiliated cable programmers via a competitive MVPD.

Consumers will also benefit from extending long-standing policies designed to promote localism, competition and diversity – including carriage and retransmission consent for local broadcast signals and local program exclusivity – equally to the new multichannel platforms. Over the past decades, Congress and the FCC have adopted and maintained must-carry, retransmission consent and program exclusivity policies to preserve the viability of local television stations and their ability to serve their local communities with a high quality mix of network and local programming. As Congress has recognized, and the Supreme Court has affirmed, the preservation of our system of free, over-the-air local broadcasting is “an important governmental interest.” *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 662-63 (1994).

To maintain a level playing field, the well-established carriage, retransmission consent and program exclusivity policies applicable to traditional multichannel video providers should apply in a comparable manner to new competitors providing comparable video services that will be licensed under the proposed national franchise. Broadcasters therefore strongly support the extension of must-carry, retransmission consent and program exclusivity policies to MVPDs that

will be franchised under this legislation. We understand that the legislation does extend these policies, as the new Section 630(j) of the Communications Act states that only a very limited number of specified provisions “shall not apply to cable operators franchised under this section.” Because must carry, retransmission and program exclusivity are not specified among these inapplicable provisions, they must accordingly apply to cable operators franchised under this new legislation.

The Marketplace Congress Created for Retransmission Consent Works as Intended to the Benefit of MVPDs, Broadcasters and, Most Importantly, Consumers

Because broadcasters support promotion of a more competitive video marketplace, we support Congress’ 1992 action creating a marketplace in which broadcasters have the opportunity to negotiate for compensation for MVPDs’ use of their signals to attract paying subscribers. As the FCC recently concluded, retransmission consent has fulfilled Congress’ purpose for enacting it and has benefited broadcasters, MVPDs and consumers alike.

Prior to the Cable Television Consumer Protection and Competition Act of 1992, cable operators were not required to seek the permission of a broadcaster before carrying its signal and were certainly not required to compensate the broadcaster for the value of its signal. At a time when cable systems had few channels and were limited to an antenna function of improving the reception of nearby broadcast signals, this lack of recognition for the rights broadcasters possess in their signals was less significant. However, the video marketplace changed dramatically in the 1970s and 1980s. Cable systems began to include not only local signals, but also distant broadcast signals and the programming of cable networks and premium services. Cable systems started to compete with broadcasters for national and local advertising revenues, but were still allowed to use broadcasters’ signals – without permission or compensation – to attract paying subscribers.

By the early 1990s, Congress concluded that this failure to recognize broadcasters' rights in their signals had "created a distortion in the video marketplace." S. Rep. No. 92, 102d Cong., 1st Sess. at 35 (1991) (*Senate Report*). Using the revenues they obtained from carrying broadcast signals, cable systems had supported the creation of cable programming and services and were able to sell advertising on these cable channels in competition with broadcasters. Congress concluded that public policy should not support "a system under which broadcasters in effect subsidize the establishment of their chief competitors." *Id.* Noting the continued popularity of broadcast programming, Congress also found that a very substantial portion of the fees that consumers pay to cable systems is attributable to the value they receive from watching broadcast signals. *Id.* To remedy this "distortion," Congress in the 1992 Cable Act gave broadcasters control over the use of their signals and permitted broadcasters to seek compensation from cable operators and other MVPDs for carriage of their signals. *See* 47 U.S.C. § 325.

In establishing retransmission consent, Congress intended to create a "marketplace for the disposition of the rights to retransmit broadcast signals." *Senate Report* at 36. Congress stressed that it did not intend "to dictate the outcome of the ensuing marketplace negotiations" between broadcasters and MVPDs. *Id.* Congress correctly foresaw that some broadcasters might determine that the benefits of carriage were sufficient compensation for the use of their signals by cable systems. *Id.* at 35. Some broadcasters would likely seek monetary compensation, while others, Congress explained, would "negotiate other issues with cable systems, such as joint marketing efforts, the opportunity to provide news inserts on cable channels, or the right to program an additional channel on a cable system." *Id.* at 36.

Thus, even at the outset, Congress correctly recognized that, in marketplace negotiations between MVPDs and broadcasters, stations could appropriately seek a variety of types of

compensation for the carriage of their signals, including cash or carriage of other programming. And while retransmission consent does not guarantee that a broadcaster will receive fair compensation from an MVPD for retransmission of its signal, it does provide a broadcaster with an opportunity to negotiate for compensation.

The FCC Recently Recommended that No Revisions Be Made to Retransmission Consent Policies

After some years' experience with retransmission consent, Congress in late 2004 asked the FCC to evaluate the relative success or failure of the marketplace created in 1992 for the rights to retransmit broadcast signals. This evaluation shows that MVPDs' complaints about retransmission consent disadvantaging them in the marketplace or somehow harming competition are groundless. In its September 2005 report to Congress about the impact of retransmission consent on competition in the video marketplace, the FCC concluded that the retransmission consent rules did not disadvantage MVPDs and have in fact fulfilled Congress' purposes for enacting them. The FCC accordingly recommended no revisions to either statutory or regulatory provisions relating to retransmission consent. FCC, *Retransmission Consent and Exclusivity Rules: Report to Congress Pursuant to Section 208 of the Satellite Home Viewer Extension and Reauthorization Act of 2004* (Sept. 2005) (*FCC Report*).

In its report, the FCC concluded that local television broadcasters and MVPDs conduct retransmission consent negotiations on a "level playing field." *Id.* at ¶ 44. The FCC observed that the retransmission consent process provides incentives for both broadcasters and MVPDs to reach mutually beneficial arrangements and that both parties in fact benefit when carriage is arranged. *Id.* Most importantly, according to the FCC, consumers benefit by having access to the broadcasters' programming carried via MVPDs. *Id.* Overall, the retransmission consent rules have, as Congress intended, resulted in broadcasters being compensated for the

retransmission of their stations by MVPDs and MVPDs obtaining the right to carry broadcast signals. *Id.*

Given these conclusions, the FCC recommended no changes to current law providing for retransmission consent rights. Moreover, the FCC explained that the retransmission consent rules are part of a “carefully balanced combination of laws and regulations governing carriage of television broadcast signals.” *Id.* at ¶ 45. Thus, if Congress were to consider proposals to restrict broadcasters’ retransmission consent compensation, the FCC cautioned that review of other rules, including must carry and copyright compulsory licensing, would be necessary as well “to maintain a proper balance.” *Id.* at ¶¶ 33, 45.

MVPDs’ Complaints about Retransmission Consent Are Groundless

Especially in light of this recent FCC report, the various repetitive complaints of MVPDs about the alleged unfairness of retransmission consent ring hollow. For instance, some cable operators have complained about the retransmission consent fees purportedly extracted from them by broadcasters. These complaints are especially puzzling because, as the FCC recently reported, cable operators have in fact consistently refused to pay cash for retransmission consent. *FCC Report* at ¶¶ 10, 35. As a result, most retransmission consent agreements have involved “a cable operator providing in-kind consideration to the broadcaster,” and cash is not yet “a principal form of consideration for retransmission consent.” *Id.* at ¶ 10. This in-kind consideration has included the carriage of affiliated nonbroadcast channels or other consideration, such as the purchase of advertising time, cross-promotions and carriage of local news channels. *Id.* at ¶ 35.

Given that cable companies have rarely paid cash for retransmission consent of local broadcast signals, this Committee should reject any MVPD claims that broadcasters’

retransmission consent fee requests are unreasonable or are somehow the cause of cable rates that for years have increased at more than double the rate of inflation. In fact, in late 2003, a GAO study did not find that retransmission consent has lead to higher cable rates. *See* GAO, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry*, GAO-04-8 at 28-29; 43-44 (Oct. 2003). In contrast, the two GAO studies discussed above showed the lack of competition to cable operators, especially by wireline providers, to be a significant cause of higher cable rates.

Complaints from MVPDs that some broadcasters attempt in retransmission consent negotiations to obtain carriage for additional programming channels are ironic, to say the least. As the FCC found, broadcasters began to negotiate for carriage of additional program streams in direct response to cable operators' refusal to pay cash for retransmission consent of broadcast signals. *FCC Report* at ¶ 10. Certainly any claims that cable operators somehow have been forced to carry unwanted programming as the result of retransmission consent are disingenuous. Under the retransmission consent regime, no cable operator is compelled to carry *any* channel, whether a local broadcast channel or an allegedly "bundled" programming channel. And if a cable operator prefers not to carry any channel beyond a broadcaster's local signal, cash alternatives are offered in retransmission consent negotiations. For example, EchoStar recently completed negotiations with Hearst-Argyle Television for a cash-only deal at a marketplace rate. Accordingly, there is no merit to allegations that broadcasters force MVPDs to carry indecent programming or that they limit MVPDs' ability to offer "family friendly" tiers.

Clearly, MVPDs want to have their retransmission cake and eat it too. In one breath, MVPDs complain that broadcasters are unreasonable in requesting cash payment for carriage of their local signals; in the next, they assert that negotiating for carriage of additional programming

is also unreasonable. In essence, MVPDs argue that retransmission consent is somehow inherently invalid because broadcasters should give their signals to MVPDs without compensation in any form. But there is no legal, factual or policy reason that broadcasters – unique among programming suppliers – should be singled out not to receive compensation for the programming provided to MVPDs, especially given MVPDs’ increasing competition with broadcasters for advertising revenue. Indeed, when enacting retransmission consent, Congress noted that cable operators pay for the cable programming they offer to customers and that programming services originating on broadcast channels should be treated no differently. *Senate Report* at 35.

Some cable operators have also presented an inaccurate picture of the video marketplace by contending that, in rural areas and smaller markets, powerful broadcast companies have undue leverage in retransmission consent negotiations with local cable operators. This is not the case. The cable industry as a whole is concentrated nationally and clustered regionally and is dominated by a smaller and smaller number of larger and larger entities. *See Twelfth Annual Report* at ¶¶ 152, 154. This consolidation will only continue assuming that the pending acquisition of Adelphia Communications by Comcast and Time Warner is approved. In contrast, a strict FCC duopoly rule continues to prohibit broadcast television station combinations in medium and small markets. In fact, a majority of cable subscribers in Designated Market Areas 100+ are served by one of the four largest cable MSOs, while only about three percent of the television stations in these markets are owned by one of the top ten television station groups. Thus, in many instances in these 100+ markets, small broadcasters – which are facing severe financial pressures -- must deal with large nationally and regionally consolidated MVPDs in

retransmission consent negotiations. In sum, local broadcasters in medium and small markets do not possess unfair leverage over increasingly consolidated cable operators.

Indeed, in small and large markets alike, nationally and regionally consolidated MVPDs have been able to exert considerable market power in retransmission consent negotiations, at the expense of local broadcasters. In actual retransmission consent agreements, broadcasters have frequently had to accept a number of egregious terms and conditions, especially with regard to digital carriage.

For example, it is not uncommon for MVPDs in retransmission agreements to refuse to carry a station's multicast digital signal that contains any religious programming and/or any programming that solicits contributions, such as telethons or other charitable fundraising programming. MVPDs have refused to carry any digital multicast signal unless the channel is broadcasting 24 hours a day, seven days a week. This requirement is very difficult for most digital stations (especially small market ones) to meet, and thereby makes it virtually impossible for many stations to obtain carriage of digital multicast signals. Under other retransmission agreements, the MVPD agreed to carry only the high definition portion of a broadcast station's digital signal, and the carriage of any portion of the broadcaster's non-high definition digital signal (including even the primary digital signal) remained entirely at the discretion of the MVPD. Other MVPDs have declined to carry the primary digital signals of non-big four network affiliated stations, unless these stations achieved certain viewer rankings in their local markets. Thus, the digital signals of many stations, including WB/UPN affiliates, Hispanic-oriented stations, religious stations and other independent stations, would not be carried by these MVPDs. It seems highly unlikely that broadcasters would accept such disadvantageous

provisions in retransmission agreements, unless the MVPDs had sufficient market power so as to insist on such provisions.

In light of these real-world examples, Congress should skeptically view any complaints from MVPDs as to how they are at the mercy of powerful broadcasters in marketplace retransmission consent negotiations. The current retransmission consent rules also already protect all MVPDs by imposing an affirmative obligation on broadcasters to negotiate in good faith and providing a mechanism to enforce this obligation. *See* 47 C.F.R. § 76.65. In fact, EchoStar was the complainant in the only “good faith” case to be decided on the merits by the FCC. In that case, the broadcaster was completely exonerated, while EchoStar was found to have abused the FCC’s processes. *EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, 16 FCC Rcd 15070 (2001). Unwarranted MVPD complaints about retransmission consent certainly cannot undermine the FCC’s conclusion that MVPDs are not disadvantaged by the existing retransmission consent process. *See FCC Report* at ¶ 44.

Some parties have suggested that Congress require baseball style arbitration for retransmission consent negotiations between broadcasters and MVPDs. While this may seem like a plausible approach at first blush, when one considers the complexity of retransmission consent negotiations, it is clear that arbitration is not a viable option. This arbitration suggestion implicitly assumes that retransmission consent negotiations are only about money, and that one should be able to choose the offer of one side or the other. That is not the case. In fact, these negotiations may involve such issues as program insertion options given to the MVPD, spot sales by the broadcaster, fiber runs between transmitter and headends, promotion spot guarantees, channel position and tier placement, DTV channel carriage, system expansion options, distribution and construction costs, studio/personnel/equipment sharing, electronic program

guide placement and news insertion options, to name but a few. Particularly when, as noted above, there is no evidence that the current free market negotiation process fails to serve the public, Congress should resist the call from MVPDs for a new federal mandate to interfere with the marketplace.

Consumers Benefit from the Retransmission Consent Process

Finally, I would like to elaborate on the FCC's conclusion in its report that retransmission consent has benefited the viewing public, as well as broadcasters and MVPDs. As the FCC specifically noted, broadcasters' ability to negotiate carriage of additional programming through retransmission consent benefits viewers by increasing consumers' access to programming, including local news channels. *See FCC Report at ¶ 35.* One excellent example is our company's NewsChannel 8 here in the Washington metropolitan area. NewsChannel 8 is a local cable news network that has expanded as a result of retransmission consent negotiations over the carriage of Allbritton's television station WJLA-TV. It provides local news, weather and public affairs programming, along with coverage of local public events. Further, this programming is zoned separately to better serve viewers in Washington, D.C., the Maryland suburbs and Northern Virginia.

Similarly, Belo used retransmission consent to obtain carriage of its regional cable news channel NorthWest Cable News (NWCN) on cable systems serving over two million households in Washington, Oregon, Idaho, Montana, Alaska and California. NWCN provides regional up-to-the minute news, weather, sports, entertainment and public affairs programming to viewers across the Northwest. These efforts are coordinated with Belo's television stations in Seattle, Portland, Spokane and Boise.

In addition to local news channels, broadcasters have used retransmission consent to provide local weather information on separate channels carried by cable systems. For example, LIN Television provides these local weather channels in several markets, including ones with a history of frequent weather emergencies such as Indianapolis. Broadcasters have moreover used retransmission consent negotiations to obtain carriage of their digital signals, thereby both benefiting viewers and, according to the FCC, furthering the digital transition. *See FCC Report* at ¶ 45.

Not only has retransmission consent encouraged broadcasters to create and launch these local news and weather programming services for carriage on cable systems, retransmission consent promotes localism in other ways. In particular, allowing local broadcasters to negotiate in the marketplace for compensation for the fair value of their signals helps local stations remain competitive in the face of competition from dozens, or even hundreds, of non-local cable and satellite channels in their markets. It also at least potentially provides revenues to help stations better fulfill their obligations to serve their local communities and their viewers.

Congress Should Reject Demands to Interfere with Free Market Negotiations for Retransmission Consent

As my testimony makes clear, Congress intended in the 1992 Cable Act to give broadcasters the opportunity to negotiate in the marketplace for compensation from MVPDs retransmitting their signals. The FCC concluded just last September that retransmission consent has fulfilled Congress' purposes for enacting it, and recommended no changes to either statutory or regulatory provisions relating to retransmission consent. This Subcommittee should accept the FCC's conclusion and continue to let broadcasters and MVPDs negotiate in the marketplace for retransmission consent. Especially in light of the FCC's conclusion that local broadcasters and MVPDs generally negotiate on a "level playing field," *FCC Report* at ¶ 44, Congress has no

basis for usurping the free functioning of the retransmission consent marketplace, as certain cable and satellite operators self-interestedly urge. Indeed, to do so would undermine the benefits that consumers gain from a well functioning retransmission consent market. Thank you for your time and attention.